



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 24, 2010

Ms. Jennifer Cohen
Assistant General Counsel
Texas Department of Public Safety
P.O. Box 4087
Austin, Texas 78773-0001

OR2010-14538

Dear Ms. Cohen:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 397631 (ORA # 10-1734).

The Texas Department of Public Safety (the "department") received a request for information pertaining to the investigation of the death of a named individual. We understand the department has made some of the requested information available to the requestor, but you claim the submitted information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Section 773.091 of the Health and Safety Code is applicable to certain information related to the provision of emergency medical services ("EMS"). Section 773.091(b) of the Health and Safety Code provides as follows:

Records of the identity, evaluation, or treatment of a patient by emergency medical services personnel or by a physician providing medical supervision that are created by the emergency medical services personnel or physician or maintained by an emergency medical services provider are confidential and privileged and may not be disclosed except as provided by this chapter.

Health & Safety Code § 773.091(b).

You assert the submitted EMS records are confidential under section 773.091; however, we note the records themselves reveal the individual concerned was deceased when EMS personnel arrived. The term "patient" is not defined for the purposes of section 773.091 of the Health and Safety Code. When a word used in a statute is not defined and that word is "connected with and used with reference to a particular trade or subject matter or is used as a word of art, the word shall have the meaning given by experts in the particular trade, subject matter, or art." Gov't Code § 312.002; *see also Liberty Mut. Ins. Co. v. Garrison Contractors, Inc.*, 966 S.W.2d 482, 485 (Tex. 1998). Taber's Cyclopedic Medical Dictionary defines "patient" as "one who is sick with, or being treated for, an illness or injury; [or] . . . an individual receiving medical care." Taber's Cyclopedic Medical Dictionary 1446 (17th ed. 1989). We also note other statutes dealing with medically related professions generally define patient as an individual who consults a health care professional. *See* Health & Safety Code § 611.001 (mental health records), Occ. Code §§ 159.001 (physician records), 201.401 (chiropractic records), 202.401 (podiatric records), 258.101 (dental records). Thus, because the generally accepted medical definition of patient indicates that the term refers to a living individual, we find the term does not encompass information that concerns the deceased individual. Accordingly, we conclude section 773.091 of the Health and Safety Code is not applicable to the submitted EMS records, and the department may not withhold them under section 552.101 on that basis.

The submitted information contains dental records. Section 258.102 of the Occupations Code provides in pertinent part as follows:

(a) The following information is privileged and may not be disclosed except as provided by this subchapter:

- (1) a communication between a dentist and a patient that relates to a professional service provided by the dentist; and
- (2) a dental record.

Occ. Code § 258.102(a). A "dental record" means dental information about a patient that is created or maintained by a dentist and relates to the history or treatment of the patient. *See id.* § 258.101(1). Information that is privileged under chapter 258 of the Occupations Code may be disclosed only under certain specified circumstances. *See id.* § 258.104 (consent to disclosure). When the patient is deceased, consent for the release of privileged information must be signed by a personal representative of the patient. *See id.* § 258.104(b)(5). The written consent for the release of privileged information required under section 258.104 must specify (1) the information covered by the release, (2) the person to whom the information is to be released, and (3) the purpose for the release. *Id.* § 258.104(c). A person who receives information that is privileged under section 258.102 of the Occupations Code may disclose that information to another person only to the extent that disclosure is consistent with the purpose for which the information was obtained. *See id.* § 258.108. Pages 8, 45, 50, and 62 consist of dental records that are privileged under section 258.102 of the

Occupations Code; therefore, the department may only release these dental records in accordance with chapter 258 of the Occupations Code.

The submitted information also contains mental health records. Section 611.002 of the Health and Safety Code governs the public availability of mental health records and provides in part the following:

- (a) Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.
- (b) Confidential communications or records may not be disclosed except as provided by Section 611.004 or 611.0045.

Health & Safety Code § 611.002(a)-(b); *see id.* § 611.001 (defining “patient” and “professional”). Sections 611.004 and 611.0045 of the Health and Safety Code provide for access to information that is made confidential by section 611.002 only by certain individuals. *See id.* §§ 611.004, 611.0045; ORD 565. Pages 49, 51, 65-75, 107-108, and 119 consist of mental health records that the department must withhold under section 611.002, unless the requestor is authorized to obtain that information under sections 611.004 and 611.0045 of the Health and Safety Code. *See id.* § 611.004(a)(5) (professional may disclose confidential information to patient’s personal representative if patient is deceased).

You assert the remaining information consists of medical records, the release of which is governed by the Medical Practice Act (“MPA”). Occ. Code §§ 151.001-165.160. Section 159.002 of the MPA provides in part as follows:

- (b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.
- (c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient’s behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Id. § 159.002(b), (c). Medical records must be released upon the patient’s signed, written consent, provided the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. *Id.* §§ 159.004, 159.005. Medical records pertaining to a deceased patient may only be released upon the signed consent of the deceased’s personal representative. *See id.* § 159.005(a)(5). Any subsequent release of medical records must be consistent with the purposes for which the governmental body obtained the records. *See id.* § 159.002(c); Open

Records Decision No. 565 at 7 (1990). Pages 6-7, 9-44, 46-48, 52-61, 63-64, 76-106, 109-118, and 120-126 consist of medical records; therefore, the department may only release these documents in accordance with the MPA. Open Records Decision No. 598 (1991). You have not established, however, that the remaining information consists of medical records; therefore, the department may not withhold the remaining information under section 552.101 in conjunction with the MPA.

The remaining information contains information about the deceased inmate's visitors. Section 552.101 of the Government Code also encompasses constitutional privacy, which consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision 455 at 4 (1987). The first type protects an individual's autonomy within "zones of privacy," which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common-law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5; *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985).

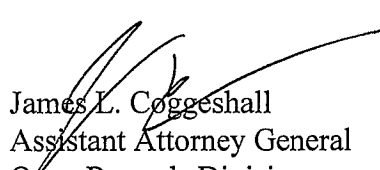
This office has applied constitutional privacy to protect certain information related to incarcerated individuals. See Open Records Decision Nos. 430 (1985), 428 (1985), 185 (1978). This office has held that those individuals who correspond with inmates possess a "first amendment right . . . to maintain communication with [the inmate] free of the threat of public exposure," and that this right would be violated by the release of information that identifies those correspondents, because such a release would discourage correspondence. ORD 185 at 2; see *State v. Ellefson*, 224 S.E.2d 666 (S.C. 1976). The information at issue in Open Records Decision No. 185 was the identities of individuals who had corresponded with inmates. In that decision, our office found that "the public's right to obtain an inmate's correspondence list is not sufficient to overcome the first amendment right of the inmate's correspondents to maintain communication with him free of the threat of public exposure." ORD 185 at 2. Implicit in this holding is the fact that an individual's association with an inmate may be intimate or embarrassing. In Open Records Decision Nos. 428 and 430, our office determined that inmate visitor and mail logs that identify inmates and those who choose to visit or correspond with inmates are protected by constitutional privacy because people who correspond with inmates have a First Amendment right to do so that would be threatened if their names were released. ORD 430, 428. The rights of those individuals to anonymity was found to outweigh the public's interest in this information. ORD 185; see ORD 430 (list of inmate visitors protected by constitutional privacy of both inmate and visitors). Although the inmate at issue is deceased and his privacy rights lapsed at death, the separate privacy interests of his visitors in their association with him are protected by constitutional privacy. Accordingly, the department must withhold the inmate visitor information we marked under section 552.101 of the Government Code in conjunction with constitutional privacy.

To conclude, the department may only release pages 8, 45, 50, and 62, which consist of dental records, in accordance with chapter 258 of the Occupations Code. The department must withhold pages 49, 51, 65-75, 107-108, and 119, which consist of mental health records, under section 552.101 in conjunction with section 611.002 of the Health and Safety Code, unless the requestor is authorized to obtain that information under sections 611.004 and 611.0045 of the Health and Safety Code. The department may only release pages 6-7, 944, 46-48, 52-61, 63-64, 76-106, 109-118, and 120-126, which consist of medical records, in accordance with the MPA. The department must withhold the information we have marked under section 552.101 in conjunction with constitutional privacy. The department must release the remaining information.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/tp

Ref: ID# 397631

Enc. Submitted documents

c: Requestor
(w/o enclosures)